



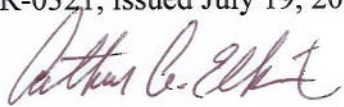
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 29 2014

THE INSPECTOR GENERAL

MEMORANDUM

SUBJECT: Response to Region 4's Proposed Management Decision on the report, *Projected Emission Reductions Overstated and Buy American Requirements Not Met Under EPA Award to the Tennessee Department of Transportation*
(Report No. No. 13-R-0321, issued July 19, 2013)

FROM: Arthur A. Elkins Jr. 

TO: Heather McTeer Toney, Regional Administrator
Region 4

We have reviewed the subject proposed management decision and agree with the proposed response. While the Office of Inspector General (OIG) agrees with the proposed response, the OIG does not necessarily agree with the Region's statement that the "buy American" requirements do not apply to the cooperative agreement because the projects are not "public works" as defined by the Office of Management and Budget (OMB) in 2 CFR Section 176.140(a)(2). OMB's legal position in its Frequently Asked Questions (FAQs) regarding ownership of a public work or public building was not clear because the OMB regulation defining those terms did not specifically reference ownership as a factor. Also, other regulatory and statutory definitions were silent as to the question of ownership. In fact, two regulatory definitions actually stated that the title did not have to be held by a federal agency. To better assess the validity of the OMB FAQs position regarding private or public ownership, on January 22, 2014, the OIG requested in writing that OMB provide a legal statement setting out the legal support for its position in the FAQs regarding ownership. OMB has not yet provided direct legal support for its FAQs position.

However, even though OMB has not provided legal support for its FAQs position regarding ownership, the OIG understands how the agency would have assumed that OMB's position in its FAQs was credible and clear. OMB had been tasked with writing American Recovery and Reinvestment Act of 2009 (ARRA) related regulations, and in one of those regulations it set out a definition of public building and public work. OMB then appeared to be interpreting its definition in ARRA-related FAQs wherein it took the position that ownership was a critical factor in determining whether the project in question was a public work or public building. Hence, Region 4 reasonably relied on the OMB FAQs when it determined that the project in question was not a public work or public building and therefore not subject to the "buy American" provision of ARRA. As a result, the OIG will not pursue the issue further.

If you have any questions regarding this report, please contact Kevin Christensen, acting Assistant Inspector General for Audit, at (202) 566-1007 or christensen.kevin@epa.gov; or Robert Adachi, Director, Forensic Audits, at (415) 947-4537 or adachi.robert@epa.gov.

cc: Deputy Regional Administrator, Region 4
Audit Follow-Up Coordinator, Region 4



THE INSPECTOR GENERAL

MAY 2 9 2014

MEMORANDUM

SUBJECT: Response to Region 4's Proposed Management Decision on the report, "Projected
Evaluation Reduction Overstated and Buy American Requirements Not Met Under EPA
Award to the Tennessee Department of Transportation
(Report No. 13-R-0321, issued July 19, 2013)

Arthur A. Elkins Jr.

FROM:

Heather McTeer Toney, Regional Administrator
Region 4

TO:

We have reviewed the subject proposed management decision and agree with the proposed response. While the Office of Inspector General (OIG) agrees with the proposed response, the OIG does not necessarily agree with the Region's statement that the "buy American" requirements do not apply to the cooperative agreement because the projects are not "public works," as defined by the Office of Management and Budget (OMB) in 2 CFR Section 156.146(a)(2). OMB's legal position in its frequently asked questions (FAQs) regarding ownership of a public work or public building was not clear because the OMB regulation defining those terms did not specifically reference ownership as a factor. Also, other regulatory and statutory definitions were silent as to the question of ownership. In fact, two regulatory definitions actually stated that the title did not have to be held by a federal agency. To better assess the validity of the OMB FAQ's position regarding private or public ownership, on January 22, 2014, the OIG requested in writing that OMB provide a legal statement setting out the legal support for its position in the FAQs regarding ownership. OMB has not yet provided direct legal support for its FAQ's position.

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